



AGENDA ITEM CONTROL SHEET

Item Title: Revisions to the Common Provisions Regulation

Meeting Date: August 20, 2015

TYPES OF ACTION

*NON-HEARING ACTIONS*

- ☐ Administrative  
☐ Briefing  
☐ Policy  
☐ Other

*REQUEST FOR HEARING*

- ☒ Rulemaking  
☐ Public  
☐ Adjudicatory  
☐ Informational

*HEARING*

- ☐ Rulemaking  
☐ Public  
☐ Adjudicatory  
☐ Informational

Is this action a Rule Review? ☐ Yes ☒ No

RECOMMENDED ACTION

- ☒ Adoption ☐ Approval ☐ Denial

MOTION

- ☒ Required ☐ Attached ☐ Not Applicable

STATUTORY AUTHORITY

- ☐ General ☒ Specific

CRS 25-7-105(1)(a), 25-7-106, 25-7-109(2)(f), 25-7-109(2)(g), 25-7-109(5) and 25-7-105(12)

EPA SUBMITTAL

Is this issue considered a SIP revision? Yes

Which SIP? Permitting Element

EPA submission deadline: November 22, 2016

Is this a delegated program? No

## ISSUE STATEMENT:

The Colorado Department of Public Health and Environment, Air Pollution Control Division ("Division") requests that the Colorado Air Quality Control Commission ("Commission") consider proposed revisions to the Common Provisions Regulation that address the United States Environmental Protection Agency's ("EPA's") final rule, titled *State Implementation Plans ["SIPs"]: Response to Petition for Rulemaking; Restatement and Update of EPA's Startup, Shutdown and Malfunction ("SSM") Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*. 80 Fed. Reg. 33840 (June 12, 2015) ("SSM SIP Call"). Specifically, the Division proposes revisions to the following sections: Affirmative Defense Provision for Excess Emissions During Malfunctions ("Section II.E.") and Affirmative Defense Provision for Excess Emissions During Startup and Shutdown ("Section II.J.").

At the same time, the Division proposes the following administrative revisions in order to maintain consistency with federal requirements and provide clarity within the regulation: add several compounds to the list of Negligibly Reactive Volatile Organic Compounds ("NRVOCs"); update the definition of "Carbon Dioxide Equivalent" reference to 40 C.F.R. Part 98, Subpart A Table A-1 - Global Warming Potentials; and add definitions for "Responsible Official," "Designated Representative," "Particulate Matter 2.5" ("PM<sub>2.5</sub>") and "Direct PM<sub>2.5</sub> Emissions" to Section I.G. In addition, the Division may also make any typographical, grammatical, and formatting corrections found throughout the Common Provisions Regulation.

## SUMMARY:

### I. Revisions to II.E. and Section II.J.

The Division requests that the Commission revise Sections II.E and II.J. in order to maintain consistency with revised federal requirements. Currently, Sections II.E. and II.J. provide an affirmative defense to civil penalties for excess emissions that occur during SSM events, that is conditional upon sources meeting specified factors and notification requirements. In the June 12, 2015 SSM SIP Call, EPA identified a number of states with SIP-approved affirmative defenses for excess emissions during SSM events. With respect to Colorado, the SSM SIP Call found Sections II.E. and II.J. to be substantially inadequate and it established a November 22, 2016 deadline for Colorado to submit corrective SIP revisions.

EPA's final rule differed from the February 22, 2013 proposal (78 Fed. Reg. 12460), made in response to a petition for rulemaking filed by the Sierra Club concerning the treatment of excess emissions in state rules during periods of SSM. In that proposal, EPA proposed to partially grant/deny the Sierra Club's petition regarding the SSM provisions in SIPs. With respect to Colorado, EPA proposed to find that Section II.J. was inadequate and Section II.E. was adequate. 78 Fed. Reg. 12529.

On May 13, 2013, the Division submitted comments supporting EPA's proposed finding of adequacy for Section II.E. and opposing EPA's proposed finding of inadequacy for Section II.J. The Division's opposition to this finding of inadequacy was based in part on the recognition that Sections II.E. and II.J. were agreed upon during a December 15, 2006 rulemaking that incorporated EPA's most recent SSM guidance and resulted in a consensus between the Division, EPA Region 8, environmental groups and industry. EPA approved Sections II.E. and II.J. for incorporation into Colorado's SIP.

Subsequent to the February 22, 2013 proposal, a federal court ruled that CAA Sections 113 and 304 precluded EPA from creating an affirmative defense to emission limits established in the agency's 2010 National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry. See *Nat'l Res. Def. Council ("NRDC") v. EPA*, 749 F. 3d 1055, 1062 (D.C. Cir. 2014). The court reasoned that it was the role of the federal courts and not the EPA to decide whether to establish an affirmative defense in civil suits to enforce the NESHAP's emission limits. See *Id.*

Based on EPA's revised interpretation of the CAA stemming from the court's decision in *NRDC v. EPA*, the SSM SIP Call maintains that both Sections II.E. and II.J. interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits. 80 Fed. Reg. 33970. The SSM SIP Call indicates that a state retains broad discretion concerning how to revise its SIP. 80 Fed. Reg. 33844.

Thus, in order to comply with the SSM SIP Call, the Division proposes to revise Sections II.E. and II.J. by adding language to clarify that the affirmative defenses are not available in federal court proceedings unless the court, in its discretion, decides to recognize and adopt the affirmative defense or decides to take into consideration some or all of the factors described in Sections II.E. and II.J. in issuing civil penalty determinations. The Division also proposes additional language indicating that Sections II.E. and II.J. do not preclude the use of alternative emission limitations expressed as work-practice based limits or standards set forth in a permit that serve as a continuous limitation during periods of SSM. Lastly, the Division included language to indicate that the proposed revisions do not take effect until such time as EPA approves the language for incorporation into Colorado's SIP.

This approach upholds many of the tenets of the December 15, 2006 consensus rulemaking while not limiting the ability of federal courts to assess liability and impose penalties for violations of emission limits in private civil enforcement cases. Moreover, this approach is reasonable given EPA's recognition that courts may decide not to assess monetary penalties in light of the effort by the source to avoid and/or minimize the excess emissions. See *79 Fed. Reg. 55926*.

If Colorado fails to submit its corrective SIP revisions by the November 22, 2016 deadline established by EPA, then EPA would impose a federal implementation plan ("FIP") within 24 months after that date.

Because Section II.E. and Section II.J. apply to any stationary source that may have excess emissions during periods of SSM, it is estimated that there are thousands of sources in Colorado that may be subject to this rule revision.

## II. Administrative Revisions

The Division proposes some administrative revisions to the Common Provisions Regulation in order to maintain consistency with federal requirements and provide clarity for affected sources. Due to the administrative nature of these revisions, only the more significant revisions are discussed below.

With respect to adding an abbreviation and definitions for "PM<sub>2.5</sub>" and "Direct PM<sub>2.5</sub> Emissions," the Common Provisions Regulation only contains an abbreviation and definitions for "Particulate Matter 10" ("PM<sub>10</sub>") and "PM<sub>10</sub> Emissions" but "PM<sub>2.5</sub>" and "Direct PM<sub>2.5</sub> Emissions" are used throughout several other AQCC regulations. For consistency and clarity, the federal definition of these terms should be included in the Common Provisions Regulation.

With respect to adding several compounds to the list of NRVOCs, EPA has published several revisions to the federal definition of NRVOC. Those changes and associated compounds follow, and should be reflected in the Common Provisions' definition of NRVOC for consistency:

- Revision to the Regulatory Definition of Volatile Organic Compounds—Exclusion of 2-amino-2-methyl-1-propanol (AMP), *79 Fed. Reg. 17037* (March 27, 2014);
- Revision to Definition of Volatile Organic Compounds— Exclusion of 2,3,3,3 tetrafluoropropene, *78 Fed. Reg. 62451* (October 22, 2013);
- Revision to Definition of Volatile Organic Compounds— Exclusion of *trans* 1-chloro-3,3,3- trifluoroprop-1-ene (Solstice™ 1233zd(E)), *78 Fed. Reg. 53029* (August 28, 2013);
- Revision to Definition of Volatile Organic Compounds— Exclusion of a Group of Four Hydrofluoropolyethers (HFPEs), *78 Fed. Reg. 9823* (February 12, 2013). The four hydrofluoropolyethers addressed by this rule are:
  - HCF<sub>2</sub>OCF<sub>2</sub>H (also known as HFE-134);
  - HCF<sub>2</sub>OCF<sub>2</sub> OCF<sub>2</sub>H (also known as HFE-236cal2);
  - HCF<sub>2</sub>OCF<sub>2</sub> CF<sub>2</sub> OCF<sub>2</sub>H (also known as HFE-338pcc13);
  - HCF<sub>2</sub>OCF<sub>2</sub> OCF<sub>2</sub> CF<sub>2</sub> OCF<sub>2</sub>H (also known as H-Galden 1040X or H-Galden ZT 130);
- Revision to Definition of Volatile Organic Compounds— Exclusion of *trans*-1,3,3,3-tetrafluoropropene, *77 Fed. Reg. 37610* (June 22, 2012);
- Revision to Definition of Volatile Organic Compounds—Exclusion of t-Butyl Acetate, *69 Fed. Reg. 69298* (July 7, 2005).

With respect to revising the definition of "Carbon Dioxide Equivalent" by updating the citation date and incorporating by reference technical corrections and clarifying revisions, the Commission will maintain consistency with federal requirements.

Finally, with respect to adding a definition for “Responsible Official” and “Designated Representative,” Regulation Number 7, Section II.F.4 requires affected oil and gas operators to submit semi-annual reports describing the air pollution control equipment used during the preceding calendar year and during the preceding ozone season. Along with these reports, affected sources must submit a certification describing how the company complied with the emission reductions required by Regulation Number 7, Section II.D.2. during those periods for the 8-hour Ozone Control area or other specific Ozone Non-attainment or Attainment/Maintenance area. Regulation Number 7, Sections XII.F.4.m. and n. require that report submittals be signed by a responsible official who must also sign the Division-approved compliance certification form for atmospheric storage tanks. This form certifies that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete. However, neither Regulation Number 7 nor the Common Provisions Regulation contains a definition for the term “responsible official.” Only Regulation Number 3, Section I.B.40 defines this term, but neither Regulation Number 7 nor the Common Provisions Regulation reference this definition. Additionally, the definition of “responsible official” contains the term “designated representative,” which is also not defined in Regulation Number 7 or the Common Provisions Regulation. In order to provide clarity for sources charged with complying with Regulation Number 7, Sections XII.F.4.m and n, the same definitions of “designated representative” and “responsible official” as currently found in the AQCC’s Regulation No. 3, Part A. I.B.18 and I.B.40, respectively, should be inserted into the list of definitions contained in the Common Provisions Regulation, Section I.G.

#### ATTACHMENTS:

1. Memorandum of Notice;
2. Proposed Rule - Common Provisions Regulation;
3. Statement of Basis, Specific Statutory Authority, and Purpose; and
4. Economic Impact Analysis (Initial Analysis).


#### CONTACT:

Please contact Sean Hackett, Regulatory Development and Outreach, Planning and Policy Program with the Air Pollution Control Division at 303-692-3131 or at [sean.hackett@state.co.us](mailto:sean.hackett@state.co.us) with any questions.

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SIGNATURES:

1.



8/7/15

Preparer: Sean Hackett

Date

2.



8/7/15

Supervisor: Dena Wojtach

Date

3.

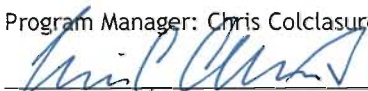


8/11/15

Program Manager: Chris Colclasure

Date

4.



12 Aug 2015

Division Director: William Allison

Date

## MEMORANDUM OF NOTICE

Item Title: Revisions to the Air Quality Control Commission's Common Provisions Regulation

Meeting Date: August 20, 2015

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**GENERAL DESCRIPTION**

The Colorado Department of Public Health and Environment, Air Pollution Control Division ("Division") requests that the Colorado Air Quality Control Commission ("Commission") consider proposed revisions to the Common Provisions Regulation that address the United States Environmental Protection Agency's ("EPA's") final rule, titled *State Implementation Plans ["SIPs"]: Response to Petition for Rulemaking; Restatement and Update of EPA's Startup, Shutdown and Malfunction ("SSM") Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction. 80 Fed. Reg. 33840* (June 12, 2015) ("SSM SIP Call"). Specifically, the Division proposes revisions to the following sections: Affirmative Defense Provision for Excess Emissions During Malfunctions ("Section II.E.") and Affirmative Defense Provision for Excess Emissions During Startup and Shutdown ("Section II.J.").

At the same time, the Division proposes the following administrative revisions in order to maintain consistency with federal requirements and provide clarity within the regulation: add several compounds to the list of Negligibly Reactive Volatile Organic Compounds ("NRVOCs"); update the definition of "Carbon Dioxide Equivalent" reference to 40 C.F.R. Part 98, Subpart A Table A-1 - Global Warming Potentials; and add definitions for "Responsible Official," "Designated Representative," "Particulate Matter 2.5" ("PM<sub>2.5</sub>") and "Direct PM<sub>2.5</sub> Emissions" to Section I.G. In addition, the Division may also make any typographical, grammatical, and formatting corrections found throughout the Common Provisions Regulation.

**WHAT IS IN THIS PACKAGE?**

This rulemaking package includes the language of the proposed changes to the Common Provisions Regulation. This package also includes the Statements of Basis, Specific Authority, and Purpose and an Economic Impact Analysis (Initial Analysis).

**EXPLANATION OF THE PROPOSED RULE****I. Revisions to Section II.E. and Section II.J.**

The Division requests that the Commission revise Sections II.E and II.J. in order to maintain consistency with revised federal requirements. Currently, Sections II.E. and II.J. provide an affirmative defense to civil penalties for excess emissions that occur during SSM events, that is conditional upon sources meeting specified factors and notification requirements. In the June 12, 2015 SSM SIP Call, EPA identified a number of states with SIP-approved affirmative defenses for excess emissions during SSM events. With respect to Colorado, the SSM SIP Call found Sections II.E. and II.J. to be substantially inadequate and it established a November 22, 2016 deadline for Colorado to submit corrective SIP revisions.

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Finally, with respect to adding a definition for “Responsible Official” and “Designated Representative,” Regulation Number 7, Section II.F.4 requires affected oil and gas operators to submit semi-annual reports describing the air pollution control equipment used during the preceding calendar year and during the preceding ozone season. Along with these reports, affected sources must submit a certification describing how the company complied with the emission reductions required by Regulation Number 7, Section II.D.2. during those periods for the 8-hour Ozone Control area or other specific Ozone Non-attainment or Attainment/Maintenance area. Regulation Number 7, Sections XII.F.4.m. and n. require that report submittals be signed by a responsible official who must also sign the Division-approved compliance certification form for atmospheric storage tanks. This form certifies that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete. However, neither Regulation Number 7 nor the Common Provisions Regulation contains a definition for the term “responsible official.” Only Regulation Number 3, Section I.B.40 defines this term, but neither Regulation Number 7 nor the Common Provisions Regulation reference this definition. Additionally, the definition of “responsible official” contains the term “designated representative,” which is also not defined in Regulation Number 7 or the Common Provisions Regulation. In order to provide clarity for sources charged with complying with Regulation Number 7, Sections XII.F.4.m and n, the same definitions of “designated representative” and “responsible official” as currently found in the AQCC’s Regulation No. 3, Part A. I.B.18 and I.B.40, respectively, should be inserted into the list of definitions contained in the Common Provisions Regulation, Section I.G.

## **MATERIALS CONTAINED IN THE PROPOSED RULE**

The redline-strikeout version of the proposed revisions to the Common Provisions Regulation is attached.

## **PUBLIC MEETINGS**

Starting June 9<sup>th</sup>, 2015, the Division began notifying interested parties of the proposed rulemaking to revise the affirmative defense provisions in Sections II.E. and II.J. The Division conducted several targeted stakeholder meetings in an attempt to narrow the scope of issues associated with this rulemaking and fully explore the range of regulatory alternatives.

## **BACKGROUND ON THE DEVELOPMENT OF THE RULEMAKING PROPOSAL**

### What is the problem?

As discussed above in the Explanation of the Proposed Rule section, with respect to revising Sections II.E. and II.J. EPA’s revised interpretation of the CAA stemming from the court’s decision in *NRDC v. EPA* maintains that Sections II.E. and II.J. are substantially inadequate and they must be revised by November 22, 2016.

With respect to adding an abbreviation and definitions for “PM<sub>2.5</sub>” and “Direct PM<sub>2.5</sub> Emissions,” the Common Provisions Regulation only contains an abbreviation and definition for “PM<sub>10</sub>” “and “PM<sub>10</sub> Emissions” and not “PM<sub>2.5</sub>” or “Direct PM<sub>2.5</sub> Emissions” but these terms are used throughout several other Commission regulations.

With respect to adding several compounds to the list of NRVOCs, currently, the Common Provisions’ NRVOc definition fails to address certain compounds that are excluded from the definition of NRVOc based on EPA’s determination that these compounds make a negligible contribution to tropospheric ozone formation.



With respect to adding definitions for “Responsible Official” and “Designated Representative” to Section I.G., these terms are only defined in Regulation Number 3, but they are utilized outside of Regulation Number 3, namely, Regulation Number 7.

How does this proposed rule help solve the problem?

Revising Sections II.E. and II.J. ensures that the Commission’s regulations are consistent with federal law after the court’s decision in *NRDC v. EPA*.

By adding the definitions and NRVOs discussed above, the Commission will ensure consistency with federal requirements and provide certainty to regulated entities.

How was the rule developed?

These revisions are made in response to and consistent with federal rules, which were noticed and discussed at the federal level. With respect to revising the affirmative defense provisions for SSM emissions, the Division held several stakeholder meetings and consulted with EPA Region 8, the National Association of Clean Air Agencies, and other states in order to fully explore the range of regulatory alternatives and their impacts on Colorado sources. The Division is not imposing any additional requirements upon air pollution sources or local governments in Colorado beyond the minimum already required by federal court decisions, laws or already established by Commission regulations.

How does the rule affect the public, regulated community, and other agencies?

By making the proposed revisions to Sections II.E. and II.J., the ability of affected sources to assert an affirmative defense in federal court to civil penalties stemming from excess emissions during SSM events will be constrained, as described in *NRDC v. EPA*.

With respect to the proposed administrative revisions, these revisions positively impact the regulated community by providing clarity and regulatory certainty.

How does the rule compare to federal requirements or adjacent state requirements?

Federal requirements:

Based on EPA’s revised interpretation of the CAA stemming from the court’s decision in *NRDC v. EPA*, the SSM SIP Call maintains that both Sections II.E. and II.J. interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits. *80 Fed. Reg. 33970*. The SSM SIP Call indicates that a state retains broad discretion concerning how to revise its SIP. *80 Fed. Reg. 33844*.

Other State requirements:

The SSM SIP Call identified 36 states with inadequate affirmative defense provisions and these states are pursuing a variety of different approaches to revising their SIPs. Pursuant to 25-7-110.5, C.R.S., this section provides an explanation of the substantive differences between the Division’s proposal and the requirements of Utah, Arizona and New Mexico. Currently, Arizona and New Mexico have affirmative defense provisions for excess emissions during SSM events (A.A.C. R18-2-310(B) and (C) and 20.2.7.111 and 20.2.7.111, 20.2.7.112 and 20.2.7.113 NMAC, respectively). These provisions contain all of the same components as the affirmative defense provisions contained in the Common Provisions Regulation Sections II.E. and II.J and EPA has determined that these provisions are substantially inadequate. Although they have not yet formally issued a proposed rule, Arizona has indicated that it will be seeking full repeal of its defense for startups and shutdowns from the state’s SIP and it will be retaining the affirmative defense for malfunctions as a state only requirement. Similarly, New Mexico will be seeking full repeal of its affirmative defenses. In response to EPA’s initial finding of inadequacy for an affirmative defense provision for unavoidable breakdowns contained in Utah’s SIP, the state submitted SIP revisions that replaced the affirmative defense with a set of criteria to be used by the state on a case-by-case basis when exercising enforcement discretion. R307-107-3. Utah’s corrective SIP revisions were approved by EPA on February 6, 2014 (*79 Fed. Reg. 7067*), prior to issuance of the final SSM SIP Call.

### How will the rule be implemented?

Division personnel will be informed of these changes to ensure that the changes are reflected in applicable permitting and regulatory actions.

### Are there time constraints?

The deadline for Colorado to submit its corrective SIP revision to EPA regarding affirmative defense provisions is November 22, 2016. Therefore, pursuant to 25-7-133, C.R.S., any such SIP revision must first be submitted to the Colorado General Assembly for review by January 15, 2016.

There are no other specific deadlines for the administrative revisions.

### Range of Regulatory Alternatives

The SSM SIP Call indicates that a state retains broad discretion concerning how to revise its SIP and there are several approaches that would be consistent with the CAA. *80 Fed. Reg. 33844*. Ultimately, in order to be approvable, special provisions regarding the treatment of excess emissions during SSM must not preclude the federal courts from determining whether violations occurred or imposing appropriate penalties. The Division chose to propose a hybrid approach that maintains the affirmative defense provisions and associated requirements in the SIP, with new language clarifying that they are not available in federal court proceedings unless the court, in its discretion, decides to recognize and adopt such affirmative defense or decides to take into consideration some or all of the factors described in Sections II.E. and II.J. in issuing civil penalty determinations. The Division also proposes additional language indicating that Sections II.E. and II.J. do not preclude the use of alternative emission limitations expressed as work-practice based limits or standards set forth in a permit that serve as a continuous limitation during periods of SSM.

Other approaches revolve around repealing provisions and/or revising provisions. Under one approach, the Commission could choose to repeal Sections II.E. and II.J. in their entirety (both from the SIP and from state-only requirements), thereby eliminating the ability of affected sources to assert an affirmative defense in all types of enforcement actions. Under another approach, the Commission could choose to repeal Sections II.E. and II.J. in their entirety from the SIP but retain them as state-only requirements, thereby eliminating the ability of affected sources to assert an affirmative defense in federal proceedings. Under a third approach, the Commission could choose to replace all references to affirmative defenses in Sections II.E. and II.J. with provisions that provide Division staff with enforcement discretion. Under this approach, rather than providing an affirmative defense, the same criteria contained in the current version of these sections would be applied on a case-by-case basis to govern the exercise of enforcement discretion by Division staff when considering whether to assess penalties for excess emission during SSM. Finally, under a fourth approach the Commission could choose to develop alternative emission limitations — either numerical, work practice standards, or a combination thereof — that apply during SSM events.

With respect to the administrative revisions, the Commission could choose to adopt all, some or none of the proposed revisions.

### What if the Air Quality Control Commission does not adopt the proposed rule?

If the Commission does not adopt the proposed revisions discussed above, Colorado runs the risk of failing to maintain consistency with federal requirements and creating regulatory uncertainty for affected sources. Specifically, with respect to revising Sections II.E. and II.J., if Colorado fails to submit its corrective SIP revisions by the November 22, 2016 deadline established by EPA, then EPA would impose a federal implementation plan ("FIP") within 24 months after that date. In addition, if Colorado fails to make the required SIP revision, or if the EPA disapproves the required SIP revision, then either event can also trigger mandatory 18- month and 24-month sanctions clocks under CAA section 179. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review ("NSR") program and restrictions on highway funding.

### Contact for more information:

Please contact Sean Hackett, Regulatory Development and Outreach, Planning and Policy Program with the Air Pollution Control Division at 303-692-3131 or at [sean.hackett@state.co.us](mailto:sean.hackett@state.co.us) with any questions.

## ECONOMIC IMPACT ANALYSIS (Initial Analysis)

Item Title: Revisions to the Air Quality Control Commission's Common Provisions Regulation

Meeting Date: August 20, 2015

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### I. ISSUE

The Colorado Department of Public Health and Environment, Air Pollution Control Division ("Division") requests that the Colorado Air Quality Control Commission ("Commission") consider proposed revisions to the Common Provisions Regulation that address the United States Environmental Protection Agency's ("EPA's") final rule, titled *State Implementation Plans ["SIPs"]: Response to Petition for Rulemaking; Restatement and Update of EPA's Startup, Shutdown and Malfunction ("SSM") Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction. 80 Fed. Reg. 33840 (June 12, 2015) ("SSM SIP Call")*. Specifically, the Division proposes revisions to the following sections: Affirmative Defense Provision for Excess Emissions During Malfunctions ("Section II.E.") and Affirmative Defense Provision for Excess Emissions During Startup and Shutdown ("Section II.J. ").

At the same time, the Division proposes the following administrative revisions in order to maintain consistency with federal requirements and provide clarity within the regulation: add several compounds to the list of Negligibly Reactive Volatile Organic Compounds ("NRVOCs"); update the definition of "Carbon Dioxide Equivalent" reference to 40 C.F.R. Part 98, Subpart A Table A-1 - Global Warming Potentials; and add definitions for "Responsible Official," "Designated Representative," "Particulate Matter 2.5" ("PM<sub>2.5</sub>") and "Direct PM<sub>2.5</sub> Emissions" to Section I.G. In addition, the Division may also make any typographical, grammatical, and formatting corrections found throughout the Common Provisions Regulation.

### II. REQUIREMENTS FOR ECONOMIC IMPACT ANALYSIS ("EIA")

Section 25-7-110.5(4)(a), C.R.S. sets forth the requirements for the initial and final Economic Impact Analysis, as stated below:

Before any permanent rule is proposed pursuant to this section, an initial economic impact analysis shall be conducted in compliance with this subsection (4) of the proposed rule or alternative proposed rules. Such economic impact analysis shall be in writing, developed by the proponent, or the Division in cooperation with the proponent and made available to the public at the time any request for hearing on a proposed rule is heard by the commission. A final economic impact analysis shall be in writing and delivered to the technical secretary and to all parties of record five working days prior to the prehearing conference. If no prehearing conference is scheduled, the economic impact analysis shall be submitted at least ten working days before the date of the rule-making hearing. The proponent of an alternative proposal will provide, in conjunction with the Division, a final economic impact analysis five working days prior to the prehearing conference. The economic impact analyses shall be based upon reasonably available data. Except where data is not reasonably available, or as otherwise provided in this section, the failure to provide an economic impact analysis of any noticed proposed rule or any alternative proposed rule will preclude such proposed rule or alternative proposed rule from being considered by the Commission. Nothing in this section shall be construed to restrict the Commission's authority to consider alternative proposals and alternative economic impact analyses that have not been submitted prior to the prehearing conference for good cause and so long as parties have adequate time to review them.

Per Section 25-7-110.5(2), C.R.S., the requirements of Section 25-7-110.5(4) shall not apply to rules which: (1) adopt by reference applicable federal rules; (2) adopt rules to implement prescriptive state statutory requirements where the AQCC is allowed no significant policy-making options; or, (3) adopt rules that have no regulatory impact on any person, facility or activity.

### III. DISCUSSION

Proposed administrative provisions discussed above are in response to and consistent with applicable federal rules. As such, they do not require an economic impact analysis.

Revising Sections II.E. and II.J. is necessary in order for the Division to comply with the SSM SIP Call, which is based on EPA's revised interpretation of the CAA stemming from the court's decision in *Nat'l Res. Def. Council ("NRDC") v. EPA*, 749 F. 3d 1055, 1064 (D.C. Cir. 2014). In order to comply with the SSM SIP Call, the Division proposes to revise Sections II.E. and II.J. by adding language to clarify that the affirmative defenses are not available in federal court proceedings unless the court, in its discretion, decides to recognize and adopt the affirmative defense or decides to take into consideration some or all of the factors described in Sections II.E. and II.J. in issuing civil penalty determinations. The Division also proposes additional language indicating that Sections II.E. and II.J. do not preclude the use of alternative emission limitations expressed as work-practice based limits or standards set forth in a permit that serve as a continuous limitation during periods of SSM.

Notably, the SSM SIP Call and related federal court decisions have impacted sources' potential legal liability associated with excess emissions that occur during SSM events. This may translate into potential increased costs that may be incurred by industry and supporting businesses, should they become subject to a federal court proceeding. The proposed revisions do not cause that potential liability and/or cost increase, but rather simply respond to the SIP Call and federal court decisions. However, recognizing that these proposed revisions may have a significant cost impact on affected sources, the Division has prepared an initial economic impact analysis that:

- (A) Identifies the industrial and business sectors that will be impacted by the proposal;
- (B) Quantifies the direct cost to the primary affected business or industrial sector; and
- (C) Incorporates an estimate of the economic impact of the proposal on the supporting business and industrial sectors associated with the primary affected business or industry sectors.

#### A. Industrial and business sectors impacted by the proposal

The proposed revisions to the Common Provisions Regulation may impact any stationary source that has excess emissions during SSM events, including but not limited to the following industrial and business sectors: fossil-fuel fired electric steam generating units owned by industry, the federal government, or state, local, or tribal government; oil and natural gas exploration, production, transmission, storage and distribution operations; petroleum refineries; iron and steel mills and foundries; glass manufacturing plants; and, portland cement plants.

#### B. Direct cost to the primary affected business and industrial sector

Being responsive to the SIP Call's underlying federal court decisions, the proposed revisions themselves do not increase the direct operational costs to the primary industrial sectors. Given the federal court's decision in *NRDC v. EPA*, sources would potentially be exposed to this additional liability regardless of whether or not the Commission adopts the proposed revisions to Sections II.E. and II.J. Because affirmative defenses for excess emissions during SSM events will no longer be available in federal court, affected sources may incur additional legal costs defending enforcement actions resulting from these events. While sources may incur additional legal costs, it is difficult to quantify these costs with a great degree of certainty because each enforcement action would be decided on its own unique set of facts.

Separately, Sections II.E. and II.J. are optional requirements, provided to sources who choose to assert an affirmative defense to civil penalties for excess emission violations that occur during SSM events. Further, the proposed revisions do not change the factors and notification requirements associated with affirmative defense provisions.

#### C. Estimate of the economic impact on the supporting business and industrial sectors associated with the primary business or industry sectors

For the same reasons discussed above in Section III.B., the proposed revisions are unlikely to have any significant economic impact on the supporting business and industrial sectors associated with the primary business or industry sectors beyond that which otherwise applies as a result of the federal court decisions.

#### IV. SUMMARY AND CONCLUSION

This economic impact analysis recognizes the potential for increased costs borne by affected sources and supporting industry. However, there is no additional cost due to the Division's proposed revisions beyond that which otherwise applies as a result of the federal court decisions. Additional costs are difficult to quantify with a great degree of certainty, for the reasons discussed above.

**DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**

# Air Quality Control Commission

## COMMON PROVISIONS REGULATION

## 5 CCR 1001-2

**I. DEFINITIONS, STATEMENT OF INTENT, AND GENERAL PROVISIONS APPLICABLE TO ALL EMISSION CONTROL REGULATIONS ADOPTED BY THE COLORADO AIR QUALITY CONTROL COMMISSION**

[illegible]

## I.F. Abbreviations

Abbreviations used in the Commission's regulations have the following meaning:

ASTM	American Society For Testing And Materials
APEN	Air Pollutant Emission Notice
AQCR	Air Quality Control Region
AQRV	Air Quality Related Value
BACT	Best Available Control Technology
BART	Best Available Retrofit Technology
BTU	British Thermal Unit
°C	Degree Celsius (Centigrade)
cal	Calorie
CAS	Chemical Abstract Service
CCR	Code Of Colorado Regulations
CdS	Cadmium Sulfide
Cfm	Cubic Feet Per Minute
CFR	Code Of Federal Regulations
CO	Carbon Monoxide
CO2	Carbon Dioxide

CO <sub>2</sub> e	Carbon Dioxide Equivalent
CEM	Continuous Emission Monitoring
COM	Continuous Opacity Monitoring
C.R.S.	Colorado Revised Statutes
dscm	Dry Cubic Meter(s) At Standard Conditions
dscf	Dry Cubic Feet At Standard Conditions
U.S. EPA	United States Environmental Protection Agency
ERC	Emission Reduction Credit
eq	Equivalence
°F	Degree Fahrenheit
FLM	Federal Land Manager
Fed. Reg.	Federal Register
FS	Forest Service
ft	Feet
g	Gram(s)
GACT	Generally Available Control Technology
gal	Gallon(s)
GHG	Greenhouse Gas
g eq	Gram Equivalent
GEP	Good Engineering Practice
gr	Grain(s)
hr	Hour(s)
HAP(s)	Hazardous Air Pollutant(s)
HC	Hydrocarbons
HCl	Hydrochloric Acid
Hg	Mercury
H <sub>2</sub> O	Water

H <sub>2</sub> S	Hydrogen Sulfide
H <sub>2</sub> SO <sub>4</sub>	Sulfuric Acid
hz	Hertz
in	Inch(s)
J	Joule
°K	Degree Kelvin
kg	Kilogram(s)
LAER	Lowest Achievable Emission Rate
l	Liter(s)
lpm	Liter(s) Per Minute
lb	Pound(s)
LTS	Long Term Strategy For Visibility Protection
m	Meter(s)
MACT	Maximum Achievable Control Technology
m eq	Milli Equivalent(s)
min	Minute(s)
mg	Milligram(s)
ml	Milliliter(s)
mm	Millimeter(s)
mol	Mole
mol. wt.	Molecular Weight
mV	Millivolt
N	Newton
NA(s)	Nonattainment Area(s)
NAAQS	National Ambient Air Quality Standards
NESHAP	National Emission Standards For Hazardous Air Pollutants
N <sub>2</sub>	Nitrogen



Ng	Nanogram (10 <sup>-9</sup> Grams)
NPS	National Park Service
NO	Nitric Oxide
NO <sub>2</sub>	Nitrogen Dioxide
NO <sub>x</sub>	Nitrogen Oxides
NRVOC(s)	Negligibly Reactive Volatile Organic Compound(s)
NSPS	New Source Performance Standards
NSR	New Source Review
O	Ohm
O <sub>2</sub>	Oxygen
Pa	Pascal
PM	Particulate Matter
PM <sub>10</sub>	Particulate Matter With Diameter Of 10 Microns Or Less
<a href="#"><u>PM<sub>2.5</sub></u></a>	<a href="#"><u>Particulate Matter With Diameter Of 2.5 Microns Or Less</u></a>
ppb	Parts Per Billion
ppm	Parts Per Million
PSD	Prevention Of Significant Deterioration
psia	Pounds Per Square Inch Absolute
psig	Pounds Per Square Inch Gauge
PTE	Potential To Emit
RACT	Reasonably Available Control Technology
°R	Degree Rankine
RFP	Reasonable Further Progress
Sec	Second
SIP	State Implementation Plan
SO <sub>2</sub>	Sulfur Dioxide

SO <sub>3</sub>	Sulfur Trioxide
SO <sub>x</sub>	Sulfur Oxides
STP	Standard Temperature And Pressure
TPY	Tons Per Year
TSP	Total Suspended Particulates
Mg	Microgram(s) (10 <sup>-6</sup> Gram)
USC	United States Code
VAC	Volts Alternating Current
VDC	Volts Direct Current
V	Volt
VOC	Volatile Organic Compound
W	Watt

## I.G. Definitions

[illegible]

## CARBON DIOXIDE EQUIVALENT

A metric used to compare the emissions from various GHGs based upon their global warming potential (GWP). CO2e is determined by multiplying the mass amount of emissions (tons per year), for each GHG constituent by that gas's GWP, and summing the resultant values to determine CO2e (tons per year).

The applicable GSPs-GWPs codified in 40 CFR Part 98, Subpart A, Table A-1 – Global Warming Potentials are hereby incorporated by reference as in effect as of October 30, 2009November 19, 2013, but not including later amendments.

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## DESIGNATED REPRESENTATIVE

A responsible natural person authorized by the owners and operators of an affected source and of all affected units at the source, as evidenced by a certificate of representation submitted in accordance with Subpart B of Code of Federal Regulations, Title 40, Part 72, to represent and legally bind each owner and operator, as a matter of law, in matters pertaining to the acid rain program. Whenever the term responsible official is used, it shall be deemed to refer to the designated representative with regard to all matters under the acid rain program.

## DIRECT PM2.5 EMISSIONS

Solid particles emitted directly from an air emissions source or activity, or gaseous emissions or liquid droplets from an air emissions source or activity which condense to form particulate matter at ambient temperatures. Direct PM<sub>2.5</sub> emissions include elemental carbon, directly emitted organic carbon, directly

[illegible]

The U.S. EPA definition of volatile organic compounds located in the Code of Federal Regulations Title 40, Section 51.100 (s), referred to within these regulations as Negligibly Reactive Volatile Organic Compounds is hereby incorporated by reference by the Commission and made a part of the Colorado Air Quality Control Commission Regulations. Materials incorporated by reference are those in existence as of the date of this regulation and do not include later amendments. The material incorporated by reference is available for public inspection during regular business hours at the Office of the Commission, located at 4300 Cherry Creek Drive South, Denver, Colorado 80246-1530, or may be examined at any state publications depository library. Parties wishing to inspect these materials should contact the Technical Secretary of the Commission, located at the Office of the Commission.

Methyl Acetate  
 Acetone  
 Methane  
 Ethane  
 Methylene Chloride (Dichloromethane)  
 1,1,1-Trichloroethane (Methylchloroform)  
 1,1,2-Trichloro-1,2,2-Trifluoroethane (CFC-113)  
 Trichlorofluoromethane (CFC-11)  
 Dichlorodifluoromethane (CFC-12)  
 Chlorodifluoromethane (HCFC-22)  
 Trifluoromethane (HFC-23)  
 1,2-Dichloro 1,1,2,2-Tetrafluoroethane (CFC-114)  
 Chloropentafluoroethane (CFC-115)  
 1,1,1-Trifluoro 2,2-Dichloroethane (HCFC-123)  
 1,1,1,2-Tetrafluoroethane (HCFC-134A)  
 1,1-Dichloro 1-Fluoroethane (HCFC 141B)  
 1-Chloro 1,1-Difluoroethane (HCFC-142B)  
 2-Chloro-1,1,1,2-Tetrafluoroethane (HCFC-124)  
 Pentafluoroethane (HFC-125)  
 1,1,2,2-Tetrafluoroethane (HFC-134)  
 1,1,1-Trifluoroethane (HFC-143A)  
 1,1-Difluoroethane (HFC-152A)  
 Parachlorobenzotrifluoride (PCBTF)  
 Cyclic, Branched, or linear completely methylated siloxanes  
 Perchloroethylene (Tetrachloroethylene)  
 3,3-dichloro-1,1,1,2,2-pentafluoropropane (HCFC-225ca)  
 1,3-dichloro-1.1.2.2.3-pentafluoropropane (HCFC-225cb)  
 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee)  
 Difluoromethane (HFC-32)  
 Ethylfluoride (HFC-161)  
 1,1,1,3,3,3-hexafluoropropane (HFC-236fa)  
 1,1, 2, 2,3-pentafluoropropane (HFC-245ca)  
 1,1,2,3,3-pentafluoropropane (HFC-245ea)  
 1,1,1,2,3-pentafluoropropane (HFC-245eb)  
 1,1,1,3,3-pentafluoropropane (HFC-245fa)  
 1,1,1,2,3,3-hexafluoropropane (HFC-236ea)  
 1,1,1,3,3-pentafluorobutane (HFC-365mfc)  
 Chlorofluoromethane (HCFC-31)

[2-amino-2-methyl-1-propanol \(also known as AMP; CAS number 124-68-5\);](#)  
[2, 3, 3, 3-tetrafluoropropene \(also known as HFO-1234yf\);](#)  
[trans 1-chloro-3, 3, 3-trifluoroprop-1-ene \(also known as Solstice™ 1233zd\(E\)\);](#)  
[HCF<sub>2</sub>OCF<sub>2</sub>H \(also known as HFE-134\);](#)  
[HCF<sub>2</sub>OCF<sub>2</sub>OCF<sub>2</sub>H \(also known as HFE-236cal2\);](#)  
[HCF<sub>2</sub>OCF<sub>2</sub>CF<sub>2</sub>OCF<sub>2</sub>H \(also known as HFE-338pcc13\);](#)  
[HCF<sub>2</sub>OCF<sub>2</sub>OCF<sub>2</sub>CF<sub>2</sub>OCF<sub>2</sub>H \(also known as H-Galden 1040X or H-Galden ZT 130\);](#)  
[trans-1, 3, 3, 3-tetrafluoropropene \(also known as HFO-1234ze\);](#)

One of the following:



- II.E.1.a. The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process to operate in the normal or usual manner, beyond the reasonable control of the owner or operator;
- II.E.1.b. The excess emissions did not stem from any activity or event that could have reasonably been foreseen and avoided, or planned for, and could not have been avoided by better operation and maintenance practices;
- II.E.1.c. Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded.
- II.E.1.d. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
- II.E.1.e. All Reasonably possible steps were taken to minimize the impact of the excess emissions on ambient air quality;
- II.E.1.f. All emissions monitoring systems were kept in operation (if at all possible);
- II.E.1.g. The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs or other relevant evidence;
- II.E.1.h. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- II.E.1.i. At all times, the facility was operated in a manner consistent with good practices for minimizing emissions. This Section II.E.1.i. is intended solely to be a factor in determining whether an affirmative defense is available to an owner or operator, and ~~shall does~~ not constitute an additional applicable requirement; and
- II.E.1.j. During the period of excess emissions, there were no exceedances of the relevant ambient air quality standards established in the Commissions' Regulations- that could be attributed to the emitting source.

## II.E.2. Notification

The owner or operator of the facility experiencing excess emissions during a malfunction ~~shall must~~ notify the Division verbally as soon as possible, but no later than noon of the Division's next working day, and ~~shall must~~ submit written -notification following the initial occurrence of the excess emissions by the end of the source's next reporting period. The notification ~~shall must~~ address the criteria set forth in Section II.E.1., above.

II.E.3. The Affirmative Defense Provision contained in this Section II.E. ~~shall not be is not~~ available to claims for injunctive relief.

II.E.4. The Affirmative Defense Provision contained in this Section II.E. is not available in federal court proceedings unless the court, in its discretion, decides to recognize and adopt such affirmative defense or decides to take into consideration some or all of the factors described in Sections II.E.1 and II.E.2. in issuing civil penalty determinations.

II.E.45. The Affirmative Defense Provision does not apply to failures to meet federally promulgated performance standards or emission limits, including, but not limited to, new source performance standards -and national emission standards for hazardous air pollutants. The affirmative defense provision does not apply to state implementation plan (sip) limits or permit limits that have been

set taking into account potential emissions during malfunctions, including, but not necessarily limited to, certain limits with 30-day or longer averaging times, limits that indicate they apply during malfunctions, and limits that indicate they apply at all times or without exception.

II.E.6 Nothing in this Section II.E. precludes the use of alternative emission limitations expressed as work-practice based limits or standards set forth in a permit that serve as a continuous limitation during periods of malfunction. This Section II.E.6. will not be construed to allow any SIP emission limitation to be altered through a permit.

## II.F. Circumvention Clause

A person shall not build, erect, install, or use any article, machine, equipment, condition, or any contrivance, the use of which, without resulting in a reduction in the total release of air pollutants to the atmosphere, reduces or conceals an emission that would otherwise constitute a violation of this regulation. No person shall circumvent this regulation by using more openings than is considered normal practice by the industry or activity in question.

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## II.J. Affirmative Defense Provision for Excess Emissions During Startup and Shutdown

Some provisions in this Section II.E. have been approved by the U.S. Environmental Protection Agency (“EPA”) for incorporation into Colorado’s State Implementation Plan (“SIP”). Some provisions are currently under review by the EPA. The following guide to the font styles used in this Section II.E. can be used to identify those provisions that have been adopted by the Air Quality Control Commission and are currently under review by the EPA.

Double underlined text will become effective when the EPA approves the language for incorporation into Colorado's SIP.

~~Double-strike-through~~ text will be effective until the EPA approves the underlined text for incorporation into Colorado's SIP.

- II.J.1. An affirmative defense is provided to owners and operators for civil penalty actions for excess emissions during periods of startup and shutdown. To establish the affirmative defense and to be relieved of a civil penalty in any action to enforce an applicable requirement, the owner or operator of the facility must meet the notification requirements of paragraph 2 in a timely manner and prove by a preponderance of the evidence that:
- II.J.1.a. The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;
  - II.J.1.b. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance;
  - II.J.1.c. If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
  - II.J.1.d. The frequency and duration of operation in startup and shutdown periods were minimized to the maximum extent practicable;
  - II.J.1.e. All possible steps were taken to minimize the impact of excess emissions on ambient air quality;





# DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

## Air Quality Control Commission

### COMMON PROVISIONS REGULATION

#### 5 CCR 1001-2

#### V. STATEMENTS OF BASIS, SPECIFIC STATUTORY AUTHORITY AND PURPOSE

##### V.Q. August 20, 2015 (Sections I.G., II.E. and II.J.)

This Statement of Basis, Specific Statutory Authority and Purpose complies with the requirements of the Colorado Administrative Procedure Act Sections 24-4-103(4) and (12.5), C.R.S. for new and revised regulations

##### Basis

The Common Provisions Regulation is designed to assist the implementation of more substantive regulatory programs authorized under the Colorado Air Pollution Prevention and Control Act ("Act") including provisions of the State Implementation Plan addressed in Section, 25-7-105(1)(a), C.R.S., emission control regulations addressed in Section, 25-7-105(1)(b), C.R.S., prevention of significant deterioration requirements addressed in Section, 25-7-105(1)(c), C.R.S., as well as other authorized programs under the Act. These revisions were proposed by the Air Pollution Control Division Quality Control Commission ("AQCC") adopted these revisions to address based on the Environmental Protection Agency's ("EPA's") revised interpretation of the Clean Air Act stemming from the court's decision in *Nat'l Res. Def. Council ("NRDC") v. EPA*, 749 F. 3d 1055, 1064 (D.C. Cir. 2014) EPA's June 12, 2015 *State Implementation Plans ("SIPs")*: *Response to Petition for Rulemaking; Restatement and Update of EPA's Startup, Shutdown and Malfunction ("SSM") Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*. 80 Fed. Reg. 33840 ("SSM SIP Call"). EPA's SSM SIP Call, relied in part on *Nat'l Res. Def. Council ("NRDC") v. EPA*, 749 F. 3d 1055, 1062 (D.C. Cir. 2014). Additionally, several administrative revisions were made in order to ensure consistency with federal requirements and provide clarity for affected sources.

##### Specific Statutory Authority

The statutory authority for these revisions is set forth in the Colorado Air Pollution Prevention and Control Act, C.R.S. § 25-7-101, et. seq. Specifically, C.R.S. § 25-7-105(1)(a) authorizes the Commission to adopt rules necessary to implement the Clean Air Act ("CAA"), and to adopt and revise comprehensive State Implementation Plans ("SIPs") to assure attainment and maintenance of National Ambient Air Quality Standards ("NAAQS"). Additionally, C.R.S. § 25-7-109(5) requires the Commission to promulgate rules setting conditions and time limitations for periods of startup, shutdown and malfunction ("SSM") or other conditions which justify temporary relief from controls. C.R.S. § 25-7-109 authorizes the Commission to adopt rules that are consistent with state policy regarding air pollution and with federal recommendations and requirements. Lastly, aAdditional authority of the Commission to adopt these revisions can be found in C.R.S. §. 25-7-106, which grants the Commission maximum flexibility in developing an effective air quality control program. Lastly, C.R.S. § 25-7-115 addresses state enforcement of violations that occur during SSM events.

##### Purpose

EPA's June 12, 2015 SSM SIP Call identified a number of states with SIP-approved affirmative defenses for excess emissions during SSM events. With respect to Colorado, the SSM SIP Call found Sections II.E. and II.J. to be substantially inadequate and it established a November 22, 2016 deadline for Colorado to submit corrective SIP revisions.

EPA's final rule differed from the February 22, 2013 proposal (78 Fed. Reg. 12460), made in response to a petition for rulemaking filed by the Sierra Club concerning the treatment of excess emissions in state rules during periods of SSM. In that proposal, EPA proposed to partially grant/deny the Sierra Club's petition regarding the SSM provisions in SIPs. With respect to Colorado, EPA proposed that the Section II.J. was inadequate and that Section II.E. was adequate. 78 Fed. Reg. 12529.

On May 13, 2013, the Division submitted comments supporting EPA's proposed finding of adequacy for Section II.E. and opposing EPA's proposed finding of inadequacy for Section II.J. The Division's opposition to this finding of inadequacy was based in part on the recognition that Sections II.E. and II.J. were agreed upon during a December 15, 2006 rulemaking that incorporated EPA's most recent SSM guidance and resulted in a consensus between the Division, EPA Region 8, environmental groups and industry. EPA approved Sections II.E. and II.J. for incorporation into Colorado's SIP.

Subsequent to the February 22, 2013 proposal, a federal court ruled that CAA Sections 113 and 304 precluded EPA from creating an affirmative defense to emission limits established in the agency's 2010 National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry. See *Nat'l Res. Def. Council ("NRDC") v. EPA*, 749 F. 3d 1055, 1062. The court reasoned that it was the role of the federal courts and not the EPA to decide whether to establish an affirmative defense in private civil suits to enforce the NESHAP's emission limits. See *Id.*

Based on EPA's revised interpretation of the CAA stemming from the court's decision in *NRDC v. EPA*, the SSM SIP Call maintained that both Sections II.E. and II.J. interfered with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits. 80 Fed. Reg. 33970. The SSM SIP Call afforded states broad discretion concerning how to revise inadequate SIP provisions. 80 Fed. Reg. 33844. Additionally, the SSM SIP Call clarified that, existing inadequate SIP provisions would remain in effect until such time as EPA evaluated and acted upon a state's SIP submission. 80 Fed. Reg. 33849.

Thus, in order to comply with the SSM SIP Call, the Division revised Sections II.E. and II.J. by adding Sections II.E.4. and II.J.4. to clarify that the affirmative defenses are not available in federal court proceedings unless the court, in its discretion, decides to recognize and adopt the affirmative defense or decides to take into consideration some or all of the factors described in Sections II.E. and II.J. in issuing civil penalty determinations. The Division also added Sections II.E.6. and II.J.7. to indicate that nothing in Sections II.E. and II.J. precludes the use of alternative emission limitations expressed as work-practice based limits or standards set forth in a permit that serve as a continuous limitation during periods of SSM. Lastly, the Division included language at the beginning of Sections II.E. and II.J. to indicate that the proposed revisions do not take effect until such time as EPA approves the language for incorporation into Colorado's SIP.

These revisions were narrowly tailored to address the court's decision in *NRDC v. EPA* in a manner that allowed Colorado to retain these affirmative defenses to the maximum extent permissible under federal law. These revisions upheld many of the tenets of the December 15, 2006 consensus rulemaking while not limiting the ability of federal courts to assess liability and impose penalties for violations of emission limits in civil enforcement cases. These revisions were consistent with EPA's recognition that courts may decide not to assess monetary penalties in light of the effort by the source to avoid and/or minimize the excess emissions. See 79 Fed. Reg. 55926. In making these revisions, the Commission recognized the extensive analysis and

consideration involved in any decision of the Division that finds a source has satisfied the factors specified in Sections II.E.1. and II.J.1. to qualify for the affirmative defense.

In addition to the revisions to Sections II.E. and II.J., the following administrative revisions were made to Section I.G. in order to ensure consistency with federal requirements and provide clarity for affected sources: definitions were added for "Responsible Official," "Designated Representative," "PM<sub>2.5</sub>" and "Direct PM<sub>2.5</sub> Emissions"; the incorporation date for the definition of "Carbon Dioxide Equivalent" was updated; several compounds were added to the list of Negligibly Reactive Volatile Organic Compounds ("NRVOCs") based on EPA's determination that these compounds make a negligible contribution to tropospheric ozone formation.

#### COLORADO AIR QUALITY CONTROL COMMISSION

ADOPTED: November 19, 2015